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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CORNEALIUS LOPES,

Plaintiff,

Vs.

FREMONT FREEWHEELERS, et al.,

Defendants.

Case No.: C 07-6213 PJH

DEFENDANTS' GARRY BIRCH AND
JASON SAGE'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF HIS MOTION TO
DISMISS PURSUANT TO RULE
12(b)(6)

Date: June 25, 2008

Time: 9:00am

Dept: Courtroom 3, 17th Floor

Judge: Phyllis J. Hamilton

I. INTRODUCTION

Garry Birch and Jason Sage requests that this Court dismiss them on the grounds
1) that the this action is barred because of the doctrine of res judicata, 2) that the action
states claims that are barred by the statute of limitations, and 3) that the complaint fails to
state a cause of action upon which relief can be granted.

II. STATEMENT OF FACTS

While jogging one morning on June 12, 2004 at approximately 8:20 a.m., plaintiff collided with a bicyclist participating in a bicycle race in Newark, California. Plaintiff was taken to Washington Hospital.

Officer Wren, who arrived at the accident shortly after it occurred, spoke to various witnesses at the scene. Byron Sheppard reported that he had been directly behind the bicyclist that collided with the plaintiff and that he had observed the plaintiff run directly into the group of bicyclist and hold his right arm out to the side, level to the ground, and strike the bicyclist in the middle of the chest. Officer Wren also spoke with Jason Sage. Sage reported that Lopes had been warned to stay off the roadway and that Sage had been told that on one occasion the plaintiff had responded something to the effect of "F___ You Jew."

The next day, Officer Wren spoke with the plaintiff. Plaintiff denied that he had been warned to stay off the course. He also denied that he had argued with any of the bicyclists or stuck his arm out while jogging to interfere with the bicyclists. Later that day, plaintiff faxed a written statement to Officer Wren.

According to Officer Farley's police report, upon his arrival at the scene, Officer Farley spoke with witness Peter Rosa. Rosa reported that Lopes had intentionally collided with the bicyclists.

On June 14, 2004, Officer Wren prepared a written police report that included the above information, as well as plaintiff's written statement. Officer Wren concluded that the report should be sent to the Alameda County District Attorney for review and filing of "PC 242" (battery) charges against the plaintiff. Officer Wren concluded: "Victims,

1 Parker and Rath believe this Act was intentional on Lopes behalf. They requested that a
2 report covering the details of this incident be sent to the DA's office."

3 The District Attorneys' Office subsequently asked the Newark Police Department
4 to obtain further information. In connection with this further investigation, witness Jason
5 Sage sent Officer Wren additional written statements and a CD. Several of the witnesses
6 asserted in their written statements that they had told the plaintiff to exit the bicycle
7 course. In addition, witness Tim O'Hara asserted that when he politely asked Lopes to
8 leave the course, Lopes responded: "F__ You, Jew." Officer Wren submitted both the
9 written statements and the CD to the District Attorney's Office.
10

11 On July 6, 2004, the District Attorney's Office asked Officer Wren to locate the
12 bicyclist that had collided with the plaintiff. Officer Wren produced a second
13 supplemental report identifying Bob Parker as the struck bicyclist. Officer Wren's
14 submission of the supplemental report ended his participation in the case.
15

16 On July 15, 2004, Alameda County Deputy District Attorney Lisa Faria asked
17 Newark Police Sergeant Robert Douglas to author a "Declaration in Support of Arrest
18 and/or Issuance of Warrant of Arrest" ("Declaration") to accompany the District
19 Attorney's criminal complaint for an arrest warrant against the plaintiff. Sergeant
20 Douglas read the criminal complaint and Officer Wren's police report with supplements
21 and concurred that probable cause existed to arrest the plaintiff. Accordingly, he prepared
22 and signed the Declaration. Once he submitted the declaration, his involvement with the
23 plaintiff's case ended.¹
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28 ¹ The statement of facts comes predominately from the Memorandum and Order, *Lopes v. Wren*, U.S.D.C. Northern District, Case No. C 06-03705 CRB, attached as Exhibit C to Defendants Request for Judicial Notice.

1 On July 15, 2004, a criminal complaint and arrest warrant were issued charging
 2 the plaintiff with misdemeanor battery arising from the June 12, 2004 collision. (Exhibit
 3 A attached to Defendant's Request for Judicial Notice). The charges were dismissed on
 4 October 12, 2005. (Exhibit B, attached to Defendant's Request for Judicial Notice).

5 On March 16, 2006, Plaintiff filed suit against Defendant Jason Sage and 10 other
 6 named individuals for injuries suffered as a result of his actions on June 12, 2004 (Exhibit
 7 D). After trial on the matter, on July 24, 2007, the court entered Judgment on Jury
 8 Verdict (Exhibit E).

10 **III. PROCEDURAL HISTORY**

11 On or about November 2, 2007, plaintiff filed the current litigation in Alameda
 12 Superior Court. On or about November 8, 2007, plaintiff filed his first amended
 13 complaint which contained 18 causes of actions against 33 individuals and entities.

14 Plaintiff's complaint alleges 18 counts or causes of action against all or some of
 15 the defendants. Count 1 alleges a violation of his civil rights under 42 U.S.C § 1983 and
 16 1985. Count 2 alleges that plaintiff is entitled to civil remedies under 18 U.S.C. §
 17 1964(a). Count 3 alleges a violation of plaintiff's civil rights under 42 U.S.C. § 1983.
 18 Count 4 alleges violations of plaintiff's civil rights under the 14th Amendment to the U.S.
 19 Constitution. Count 5 alleges that defendants should be charged under "ss242". Count 6
 20 alleges plaintiff's due process rights were violated under the 14th Amendment to the U.S.
 21 Constitution. Count 7 alleges a violation of 18 U.S.C §1962(d). Count 8 alleges various
 22 defendants violated plaintiff's right under 42 U.S.C §1985 and 42 U.S.C. §2000(b) and
 23 (c). Count 9 alleges plaintiff has suffered injury in violation of 42 U.S.C. §1985. Count
 24 10 alleges negligence. Count 11 alleges defendants violated plaintiff's rights under the
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1 14th Amendment to the United States Constitution. Count 12 alleges defendants violated
2 plaintiff's rights under the 14th Amendment to the United States Constitution and
3 pursuant to 42 U.S.C. § 1981. Count 13 alleges that plaintiff's Fifth Amendment right
4 against self-incrimination under the United States Constitution was infringed. Count 14
5 alleges defendants violated plaintiff's right under the Sixth Amendment to the United
6 States Constitution. Count 15 alleges plaintiff's rights under the 14th Amendment to the
7 United States Constitution were violated. Counts 16, 17, and 18 allege various causes of
8 action but do not specify the statutory basis for those injuries. Defendant Garry Birch was
9 named in Counts 5, 7, 8, 12, and 18. Defendant Jason Sage was named in Counts 1, 4, 5,
10 7, 8, 12, and 18.
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13 On December 7, 2007, this case was removed from the Alameda Superior Court
14 to the Northern District of California because the complaint contained a federal question.
15 On December 13, 2007, Defendant CB Richard Ellis, Inc. filed its Motion to Dismiss
16 pursuant to 12(b)(6) on grounds that *res judicata* and statute of limitations. On March 10,
17 2008, this court granted Defendant CB Richard Ellis, Inc.'s motion and dismissed it from
18 this case.
19

20 On May 7, 2008, Defendant Larry Nolan filed his Motion to Dismiss pursuant to
21 12(b)(6). On May 15, 2008, Defendants USA Cycling, Inc. and Linda Buffetti filed their
22 Motion to Dismiss pursuant to 12(b)(5)(6). On May 13, 2008, Defendants Lisa Faria,
23 Shara Mesic Beltrano and Stacy Pettigrew filed their motion to dismiss pursuant to
24 12(b)(6).
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IV. ARGUMENT

A. THE CLAIMS ARE BARRED AGAINST JASON SAGE BY THE DOCTRINE OF RES JUDICATA

Plaintiff originally filed suit against Jason Sage and 10 other individuals or entities with an attorney representing him on March 16, 2006. (See Exhibit D attached to Request for Judicial Notice). The court may take judicial notice of these official records for purposes of this Rule 12(b)(6) motion. *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994); *Day v. Moscow*, 955 F.2d 807, 811 (2nd Cir. 1992).

Res judicata, or claim preclusion, prohibits the re-litigation of any claims that were raised or could have been raised in a prior action. *Western Radio Servs. Co.*, 123 F.3d 1189, 1992 (9th Cir. 1997). The purpose of the doctrine is to “relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.” *Marin v. HEW, Health Care Financing Agency*, 769 F.2d 590, 594 (9th Cir. 1985). Res judicata has three requirements. First, there must be an identity of claims, but the claims need not be identical. *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713-714 (9th Cir. 2001). The central criterion in determining whether there is an identity of claims between the first and second adjudications is whether the two suits arise out of the same transactional nucleus of facts. *Id.* at 714. Second the previous action must have resulted in a final judgment on the merits. *Id.* at 713. Third, there must be identity or privity between the parties. *Id.*

Here, the plaintiff is the same in both cases. Furthermore, while the previous litigation filed in Alameda Superior Court dealt with negligence arising from the pedestrian bicycle accident that occurred in Fremont California on June 12, 2004, the

1 current litigation deals with various actions taken by Jason Sage in reporting the events of
2 the accident to the local authorities. Since the criminal charges were dismissed on
3 October 12, 2005 and plaintiff filed the negligent suit against Defendant Sage on March
4 16, 2006, plaintiff knew all the facts and could have plead at that time his current claims
5 of constitutional violations. Defendant Jason Sage and others should not constantly be
6 brought back into court over claims arising from the exact same set of facts.
7

8 Therefore, the doctrine of Res Judicata bars this current litigation against
9 Defendant Jason Sage.

10 **B. THE CLAIMS ARE BARRED BY THE STATUTES OF LIMITATION**

11 Plaintiff has sued Garry Birch and Jason Sage under 42 U.S.C. 1981, 1983, 1985.
12 All facts in the First Amended Complaint deal with the time period between when the
13 accident occurred and when the District Attorney filed charges against the Plaintiff.
14

15 “The Ninth Circuit Court of Appeals has determined that claims brought under 42
16 U.S.C. § 1981 in California are governed by California’s statute of limitations for
17 personal injury actions. Accordingly, Plaintiff’s 42 U.S.C. § 1981 claim is governed by
18 California’s statute of limitations for personal injury actions, which is two years.”
19 (Cal.Code of Civ. Proc § 335.1) *Batiste v. City of Emeryville*, WL 1811158, (N.D.Cal
20 2004).
21

22 “Because section 1983 does not contain a statute of limitations, federal courts
23 apply the forum state’s statute of limitations for personal injury actions and incorporate
24 the forum state’s law of tolling, both statutory and equitable, unless it is inconsistent with
25 federal law. As of January 1, 2003, California’s statute of limitations for personal injury
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1 actions is two years; before that, it was a year.” *Sumahit v. Parker*, WL 449713,
2 (E.D.Cal. 2008).

3 “The Statute of Limitations for actions filed under 42 U.S.C. § 1985(3) is not
4 specified by federal law. The rule, under these circumstances, is that the most analogous
5 Statute of Limitations of the State from which the claim arose governs.” Smith v. Private
6 Industry Council of Westmoreland and Fayette counties, Inc., 622 F.Supp. 160, 167-168
7 (USDC W.D.Penn 1985). Thus the applicable California Statute of Limitations would be
8 two years under California Code of Civil Procedure § 335.1.
9

10 Even if the court were to construe the conspiracy in the broadest possible terms
11 and find that the conspiracy lasted until criminal charges were dismissed against the
12 plaintiff, the two-year statute of limitations has run since the criminal charges were
13 dismissed on October 12, 2005 and this present litigation was filed over two years later,
14 on November 2, 2007.
15

16 Plaintiff also sued Birch and Sage for malicious prosecution in Count 18. Even if
17 these allegations could be proved, the applicable statute of limitations for a Malicious
18 Prosecution is two years under California Code of Civil Procedure 335.1. Since over two
19 years had elapsed between the dismissal of the criminal charges and the filing of the
20 current litigation, the statute of limitations has run.
21

22 Therefore, the statutes of limitation bars the claims.
23

24 **C. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION ON**
25 **WHICH RELIEF CAN BE GRANTED**

26 In Count 5, both Defendant Garry Birch and Jason Sage are sued and the
27 defendant does not state any statutory reasons for the cause of action but does state that
28 “Defendants should be charged with ss242”. Nowhere in the complaint does Plaintiff

1 state the title to “ss242” but it appears that Plaintiff is suing under 18 U.S.C. 242. In
2 addition, both Defendants are sued in Count 7 for violations to 18 USC 1962. Title 18 of
3 the United States Code deal with criminal violations and Plaintiff is not a proper party to
4 bring such litigation even if the facts he alleged were correct.

5 Therefore, Counts 5 and 7 should be dismissed.

6
7 In Count 4, Defendant Jason Sage is sued for violations of Plaintiff’s Fourteenth
8 Amendment rights and Due Process of law. However, Plaintiff has failed to state how
9 Defendant Sage was a state actor who could even if he wanted to violate Plaintiff’s due
10 processes under the law. Therefore, Count 4 must be dismissed.

11 **V. CONCLUSION**

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13 For the reasons set forth above, the motion should be granted.

14 Respectfully submitted,

15 Dated: May 20, 2008

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